APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DORIS JEAN FISHER	**CIVIL ACTION**
VERSUS	**NO.**
WILLIE DANOS, **GULF OIL CORPORATION** **and** **THE TRAVELERS INSURANCE CO.**	**SECTION E**

COMPLAINT

Plaintiff, DORIS JEAN FISHER, respectfully states and alleges upon information and belief that:

I.

Plaintiff, DORIS JEAN FISHER is a resident of and domiciled in Buras, Parish of Plaquemines, State of Louisiana.

II.

Defendant, WILLIE DANOS is a resident of and domiciled in the Parish of Plaquemines, State of Louisian.. and at all times pertinent hereto owned, controlled, and operated a vessel known as the "ROAD RUNNER II".

III.

Defendant, GULF OIL CORPORATION is a foreign corporation authorized to do and doing business in the State of Louisiana.

IV.

Defendant, TRAVELERS INSURANCE COMPANY, at all material times hereto insured defendant GULF OIL CORPORATION under which policy of insurance said insurance company agreed to undertake and satisfy and pay any and all claims for damages which GULF OIL CORPORATION may be legally liable because of any negligence of GULF OIL CORPORATION. As a consequence of the events set forth below, plaintiff has a direct right of action under LSA R.S. 22:655, against the said TRAVELERS INSURANCE COMPANY as the insurer of GULF OIL CORPORATION.

V.

This is a case of admiralty and maritime jurisdiction, as will hereinafter more fully appear, within the meaning of Rule 9(h).

VI.

On November 11, 1974 Plaintiff was an invitee aboard defendant WILLIE DANOS' Lafitte Skiff "ROAD

RUNNER II" in the navigable waters of Emeline Pass four miles east of Venice, Louisiana when she was caused to sustain serious, permanent and disabling injuries to her mind and body, all as direct result of the negligence of defendant WILLIE DANOS and/or the unseaworthy condition of defendant DANOS' vessel, the negligent operations and maintenance of said vessel, it's gear and appurtenances. Plaintiff further avers that her injuries were caused or contributed to by the negligence of GULF OIL CORPORATION in failing to properly maintain and light a fixed structure in the navigable water of Emeline Pass.

VII.

That as a direct result of the said accident and injuries sustained, plaintiff was rendered disabled and has sustained a loss of wages, has incurred numerous medical expenses and will incur future medical expenses, has suffered extreme pain and mental anguish in the past and will suffer extreme pain and mental anguish in the future, and has suffered and will suffer in the future extreme embarrassment and mental anguish, all for which plaintiff is entitled to sue and recover from the defendants herein, damages in the sum of THREE HUNDRED THOUSAND AND NO/100 ($300,000.00) DOLLARS.

VIII.

The said accident and resulting permanent injuries to plaintiff were due solely and entirely to the negligence of

defendants WILLIE DANOS through the negligent operation, maintenance and care of said vessel, to the unseaworthy condition of said vessel, and to the failure to equip said vessel with the proper gear and appurtenances and the negligence of GULF OIL CORPORATION in failing to properly maintain a jettie owned and under their control in Emeline Pass, four miles east of Venice, Louisiana.

WHEREFORE, plaintiff prays that there be judgment in her favor and against the defendants WILLIE DANOS, GULF OIL CORPORATION and TRAVELERS INSURANCE COMPANY jointly and in solido for the sum of THREE HUNDRED THOUSAND AND NO/100 ($300,000.00) DOLLARS, plus interest and costs.

/S/ROBERT McCOMISKEY
ROBERT McCOMISKEY
912 Carondelet Building
226 Carondelet Street
New Orleans, La. 70130
Phone: 581-5981

/S/ JEAN S. SENAC, JR.
JEAN S. SENAC, JR.
3814 Veterans Mem. Blvd.
Metairie, La. 70002
Phone: 888-3090

PLEASE SERVE:

Willie Danos
P.O. Drawer C
Venice, La.

Gulf Oil Corporation through its agent
CT Corporation Systems
1300 Hibernia Bank Building
New Orleans, La.

Travelers Insurance Company through
Honorable Wade O. Martin
Secretary of State
Baton Rouge, La.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DORIS JEAN FISHER,	CIVIL ACTION
Plaintiff	NO. 75-3447
VERSUS	SECTION "E"
WILLIE DANOS, GULF OIL CORPORATION AND THE TRAVELERS INSURANCE COMPANY,	
Defendants	

AMENDED AND SUPPLEMENTAL ANSWER OF GULF OIL CORPORATION AND THE TRAVELERS INSURANCE COMPANY

The amended and supplemental answer of Gulf Oil Corporation (hereinafter Gulf) and The Travelers Insurance Company (hereinafter Travelers), filed with leave of court, to the complaint of Doris Jean Fisher represents:

1.

Doris Jean Fisher is a resident citizen of Louisiana.

2.

Gulf Oil Corporation is a corporation organized and existing under the laws of Pennsylvania, with its principal business establishment in Pennsylvania.

3.

The Travelers Insurance Company is a corporation organized and existing under the laws of Connecticut, with its principal business establishment in Connecticut.

4.

The matter in controversy exceeds $10,000.00, exclusive of interest and costs.

5.

The claim asserted by Doris Jean Fisher against Gulf Oil Corporation and The Travelers Insurance Company, previously brought herein by the plaintiff only under the maritime jurisdiction of the court, is also within the diversity jurisdiction of the court.

6.

Gulf and Travelers are entitled to and demand tarial by jury on all issues.

7.

In the alternative, the plaintiff's claim against Gulf and Travelers is barred by the defense of res judicata because she has by written compromise released all claims arising out of the accident and injuries in suit.

8.

In the further alternative, such rights as plaintiff may have against Gulf and Travelers are reduced by the proportionate negligence of Willie Danos and, additionally, by any sums, benefits or considerations which plaintiff has received from Willie Danos or on account of Willie Danos.

WHEREFORE, Gulf Oil Corporation and The Travelers Insurance Company pray for trial by jury on all issues, and that the plaintiff's claims be dismissed with prejudice at the plaintiff's costs.

Charles Hanemann
of
Henderson, Hanemann & Morris
A Professional Law Corporation
Attorneys for Defendants Gulf
Oil Corporation and The
Travelers Insurance Company
300 Lafayette Street
Houma Louisiana 70360
Telephone: 581-1434 (New Orleans)

CERTIFICATE

I hereby certify that I have served a copy of the above and foregoing Amended and Supplemental Answer of Gulf Oil Corporation and The Travelers Insurance Company on plaintiff, by placing a copy of said answer in the United States Mail, postage prepaid, addressed to plaintiff's counsel at his address of record.

Houma, Louisiana, October _____, 1976.

_____

Charles Hanemann

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DORIS JEAN FISHER	CIVIL ACTION
VERSUS	NO. 75-3447
WILLIE DANOS, GULF OIL CORPORATION and THE TRAVELERS INSURANCE COMPANY	SECTION "E"
	PRE-TRIAL ORDER

1. A Pre-Trial Conference was held on Tuesday, January 17, 1978 at 9:00 A.M., before the Honorable Fred J. Cassibry.

2. Present: For Plaintiff, DORIS JEAN FISHER:

Robert McComiskey,
Attorney at Law
407 Decatur Street
New Orleans, Louisiana 70130

For Defendants, GULF OIL and TRAVELERS INSURANCE COMPANY:

Charles Hanemann, Attorney at Law
Henderson, Hanemann & Morris
(A Professional Law Corporation)

300 Lafayette Street
Houma, Louisiana 70360

For Defendant in Cross-Claim,
WILLIE DANOS:

Darryl W. Bubrig, Sr.
Attorney at Law
Bubrig & Scandurro
P.O. Drawer K
Buras, Louisiana 70041

3. DORIS FISHER, a citizen of Louisiana, sued WILLIE DANOS, a citizen of Louisiana, and GULF OIL CORPORATION, THE TRAVELERS INSURANCE COMPANY and CHEVRON OIL COMPANY, all citizens of states other than Louisiana. The plaintiff has voluntarily dismissed her suit against Chevron Oil Company. The plaintiff has compromised with Willie Danos and dismissed her suit against him. The sole remaining defendants, therefore, are Gulf Oil Corporation and The Travelers Insurance Company, who have filed a cross-claim against Willie Danos.

4. The substantive law to be applied is Admiralty. There is diversity of citizenship. Trial will be by jury.

5. No motions are presently pending. Both the plaintiff and the defendant in cross-claim have been deposed. But the court reporter who recorded the depositions has

recently informed counsel that he has lost the shorthand notes of the depositions and, through thorough and diligent search, has been unable to locate them. Accordingly, the depositions of the plaintiff and of the defendant in cross-claim must be taken again, and counsel are in the process of arranging their depositions by agreement. If agreement cannot be reached, however, counsel for defendants contemplates moving to reopen discovery and compel the depositions.

Defendant, Gulf Oil, did not answer plaintiff's interrogatories of July 16, 1976 until December 28, 1977, thirty-two (32) days before trial is scheduled. Plaintiff is entitled to depose numerous individuals mentioned in defendant's answers to interrogatories and does not think that this can be accomplished before January 30, 1978, unless defendant is willing to voluntarily produce all those individuals mentioned in their answers to interrogatories before January 25, 1978, at a time convenient to counsel for plaintiff.

6. (a) A brief summary of the material facts claimed by the plaintiff is:

On or about November 8, 1974, the plaintiff, Doris Jean Fisher was a passenger in the M/V "ROAD RUNNER II", a Lafitte skiff owned and operated by Willie Danos. At approximately o'clock P.M. on that date, Danos was navigating his vessel in a northeast direction through Dennis Pass, also known as Emeline Pass, when his vessel ran into an unlit wind dam protruding over one

hundred (100) feet into the Pass. The wind dam struck by the M/V "ROAD RUNNER II", was one of five (5) wind dams which defendant had constructed without written approval of the United States Coast Guard and Corps of Engineers. The particular wind dam struck was one of two (2) fifty (50) feet longer than the other three (3) wind dams. There were no signs or lights to warn approaching vessels of these wind dams and more particularly no warning devices that two (2) of these wind dams were longer than those on either side of the one (1) that the M/V "ROAD RUNNER II" struck. As a result of thea collision the force of impact drove the plaintiff's leg through the vessel's transom causing the following injuries; multiple abrasions and contusions, a cerebral concussion, a comminuted closed fracture of the left proximal femur, a comminuted closed fracture of the right tibia, a comminuted closed fracture of the right clavicle and probable herniated disc of L-5, S-1.

Since filing the instant suit, plaintiff has settled her claim against Willie Danos and dismissed him from this action.

6. (b) The following is a brief summary of material facts claimed by Gulf Oil Corporation and The Travelers Insurance Company.

Dennis Pass, also known as Emeline Pass, is a branch of one of the minor passes of the Mississippi River. A minor pass known as Baptiste Collette Bayou flows from the left descending, or East, bank of the Mississippi River

at approximately 11.3 miles AHP. Emeline Pass branches off from Baptiste Collette Bayou, and flows in a generally northeasterly direction toward the Gulf of Mexico. Emeline Pass travearses an oilfield, known as the Grand Bay field, operated by Gulf Oil Corporation. In 1968, to check erosion, Gulf Oil Corporation erected seven wind dams, two along the northwest bank of Emeline Pass, and five along the southeast bank. Gulf Oil Corporation designed, erected and maintained the wind dams in a safe, proper and lawful manner.

Willie Danos owned and operated a Lafitte skiff, called the M/V ROADRUNNER II. The Plaintiff claims that she was a passenger in the M/V ROADRUNNER II struck the third wind dam from the Mississippi River on the southeast bank of Emeline Pass, while heading northeast down Emeline Pass.

Gulf Oil Corporation and The Travelers Insurance Company do not admit that an accident occurred, or that an accident occurred as claimed.

If an accident occurred, and occurred as claimed, it was caused solely and proximately by the concurrent negligence of the plaintiff and Willie Danos. In the alternative, the negligence of the plaintiff and Willie Danos was active, any negligence on the part of Gulf Oil Corporation being merely passive. In the further alternative, the negligence or other fault of the plaintiff and of Willie Danos played a far greater causal role in the accident than

did any negligence or fault of Gulf Oil Corporation.

The plaintiff's injuries and damages are not as great as claimed.

The plaintiff has compromised her claims against Willie Danos, and has executed a release in his favor. The release serves to release the plaintiff's claims against Gulf Oil Corporation, also. Alternatively, the plaintiff's claims against Gulf Oil Corporation are reduced by the proportion to which her own negligence and that of Willie Danos contributed to the accident.

6. (c) Defendant in cross-claim adopts as to the circumstances of the accident, the summary of material facts as set forth by the plaintiff.

7. Uncontested material facts are:

(a) The plaintiff is, and was at all material times, a citizen of Louisiana.

(b) At all material times, Willie Danos owned and operated a Lafitte skiff known as the M/V "ROAD RUNNER II".

(c) On August 10, 1976, the plaintiff executed a Receipt and Release.

8. The following issued of fact are in contest:

(a) Negligence or fault of Gulf Oil Corporation;

(b) Negligence or fault of Willie Danos;

(c) Negligence or fault of the plaintiff;

(d) Active-passive negligence;

(e) Apportionment of fault;

(f) The manner in which the accident occurred;

(g) Causation;

(h) Foreseeability;

(i) The condition of the M/V ROADRUNNER II and of its appurtenances

(j) Condition of Dennis Pass;

(k) Nature and extend of damages, if any;

(l) Credibility of witnesses.

9. The following issued of law are in contest:

(a) Issues of law inherent in the foregoing issues of fact;

(b) What duties, if any, were owed to the plaintiff;

(c) If any duties were owed to the plaintiff, by whom they were owed;

(d) Standards of care;

(e) Whether the wind dams were constructed and/or maintained in violation of applicable law or regulations;

(f) Effect of the releases;

(g) Recoverable items of damages.

10. Discovery is not complete. The court reporter who took the deposition of both, plaintiff and Willie Danos, has lost his shorthand notes and it will be necessary to redepose both. Defendant has recently answered plaintiff's interrogatories and provided the names of numerous persons whom plaintiff must depose prior to trial.

11. (A) The following is a list of exhibits to be offered by the plaintiff:

(a) Interrogatories to parties;

(b) Answers thereto;

(c) Request for admissions to Gulf Oil;

(d) Answers thereto;

(e) Any deposition of a party or witness who is unable to be present at trial;

(f) Photographs of Dennis Pass;

(g) Photographs of the M/V "ROAD RUNNER II";

(h) Photographs of the plaintiff;

(i) Medical records of plaintiff from West Jefferson General Hospital, including x-rays;

(j) Medical records of plaintiff from Dr. Jack L. Winters

(k) Medical records of plaintiff from Port Sulphur Hospital;

(l) Wage and tax records of plaintiff;

(m) Charts, drawings and diagrams of experts;

(n) Regulations of the Corps of Engineers;

(o) Applicable OSHA Regulations;

(p) Photographs of the wind dams in question;

(q) Any exhibit listed by any other party.

11. (B) Defendant Gulf Oil may introduce at trial the following exhibits:

(a) Interrogatories to parties;

(b) Answers thereto:

(c) Deposition of the plaintiff;

(d) Deposition of Willie Danos;

(e) Any deposition admissible under the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure;

(f) Photographs of Dennis Pass;

(g) Photographs of Southwest Pass;

(h) Charts of the Grand Bay area;

(i) Certified copies of official records of the United States Coast Guard;

(j) "Release and Agreement" of February 28, 1975;

(k) "Receipt and Release" of August 10, 1976;

(l) Check No. 1238 against the account of Mr. or Mrs. Willie J. Danos with the Delta Bank and Trust Company;

(m) Any exhibit listed in the pre-trial order or in any supplement thereto, or offered at the trial, by any other party.

11. (C) Defendant in cross-claim, Willie Danos, may introduce the following exhibits:

(a) Photographs of the wind dams in question;

(b) Any exhibit listed by any other party.

12. All parties reserve the right to use any deposition admissible under the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure.

13. All parties may use a black board, chalk, pointer, posters or charts and sketches of the Grand Bay area.

14. Plaintiff will call the following witnesses:

(a) Doris Jean Fisher, Euras, Louisiana

(b) Pat

(c) Dr. Jack L. Winters
925 Avenue C, Marrero, La. 70072

(d) Charles Wecker
Foot Prytanis Street, New Orleans, La.

(e) Expert to be named

(f) Any witness listed by any other party.

Defendant, Gulf Oil, may call the following witnesses:

(a) H. D. Carter, Venice, Louisiana, concerning facts;

(b) R. E. Valentine, Houston, Texas, concerning facts;

(c) Fred Durio, Lafayette, Louisiana, concerning facts;

(d) Henry Cooper, Venice, Louisiana, concerning facts;

(e) The plaintiff, on cross-examination;

(f) Willie Danos, P.O. Drawer C, Venice, Louisiana 70091, concerning facts, damages and releases;

(g) John D. Monteiro, Houma, Louisiana, expert in marine construction;

(h) Bud Lathan, Venice, Louisiana, expert boatman;

(i) Robert Fry, Houston, Texas, Expert in marine construction:

(j) William Key, 129 Harding Drive, Houma, Louisiana, expert boatman;

(k) Chief Petty Officer Ballance, Hale Boggs Federal Office Building, New Orleans, Louisiana, concerning facts;

(l) Captain R. R. Morgan, Hale Boggs Federal Office Building, New Orleans, Louisiana, concerning facts;

(m) H. L. Gauthier, New Orleans, Louisiana, concerning facts;

(n) N. H. Moore, P.O. Box 61790, New Orleans, Louisiana 70161, concerning facts;

(o) Dr. Jack L. Winters, 925 Avenue C, Marrero, Louisiana 70072, concerning damages;

(p) Sherman O'Brian, c/o The Den, Venice, Louisiana, concerning damages;

(q) Bobby Mitchell, Venice, Louisiana, concerning damages;

(r) Butch Copeland, Venice, Louisiana, concerning damages;

(s) Mrs. Robert Fisher, Route 3, Tuscumbia, Alabama, concerning facts and damages;

(t) Donnie Moreaux, Venice, Louisiana, concerning facts and damages;

(u) Mrs. Johnny Garrett, Venice, Louisiana, concerning facts and damages;

(v) Mrs. Coney, Nairn, Louisiana, concerning damages;

(w) James Ross Fisher, Venice, Louisiana, concerning damages;

(x) Mrs. Willie J. Danos, P.O. Drawer C, Venice, Louisiana 70091, concerning damages and releases;

(y) Darryl Bubrig, P.O. Drawer K, Buras, Louisiana 70041, concerning releases;

(z) Tressie Adams, P.O. Drawer K, Buras, Louisiana 70041, concerning releases;

(aa) Nicoline Armstrong, P.O. Drawer K, Buras, Louisiana 70041, concerning releases;

(bb) Jean E. Senac, Jr., 407 Decatur Street, New Orleans, Louisiana 70130, concerning releases;

(cc) Any witness listed in the pre-trial order or in any supplement thereto, or called at the trial, by any other party.

Defendant in cross-claim may call the following witness:

(a) Willie Danos, Venice, Louisiana Fact

(b) Any witness listed by any other party.

No further witnesses can be added to the Pre-Trial Order less than ten (10) full work days before trial.

15. This is ~~(is not)~~ a jury case and a jury trial is ~~(is not)~~ applicable to all aspects of the case.

(Proposed jury instructions any any special questions that the Court is asked to put to prospective jurors on voir dire, shall be delivered to the Court and opposing counsel not later than one week prior to the trial date, unless specific leave to the contrary is granted by the Court.

Each party shall file with the Court a separate memorandum on contentions of fact and law at least two (2) days prior to trial.)

16. The issue of liability (will or will not) be tried separately from that of Quantum.

17. The defendants' contention that a "release and agreement" may bar plaintiff's rights against defendant might best be resolved before the trial on the merits.

18. It is expected that trial of this case will require 3 days. Trial of this case is hereby set for the 30th day of January, 1978, at _____ o'clock A.M.

19. This Pre-Trial Order has been formulated after conference at which counsel for the respective parties have appeared in person. Reasonable opportunity has been afforded counsel for corrections, or additions, prior to signing. Hereafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court or the Order of the Court to prevent manifest injustice.

20. The possibility of settlement of this case was considered.

New Orleans, Louisiana, this 17 day of January, 1978.

/S/FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

APPROVED:

/S/ROBERT McCOMISKEY
ROBERT McCOMISKEY
ATTORNEY FOR PLAINTIFF
407 DECATUR STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: (504) 581-5981

/S/CHARLES HANEMANN
CHARLES HANEMANN - of
HENDERSON, HANEMANN & MORRIS
A PROFESSIONAL LAW CORPORATION
ATTORNEYS FOR DEFENDANTS, GULF OIL
CORPORATION AND THE TRAVELERS
INSURANCE COMPANY
300 LAFAYETTE STREET
HOUMA, LOUISIANA 70360
TELEPHONE (504) 581-1434 - (New Orleans)

/S/DARRYL W. BUBRIG, SR.
DARRYL W. BUBRIG, SR.
BUBRIG & SCANDURRO
ATTORNEYS AT LAW
P.O. DRAWER K
BURAS, LOUISIANA 70041
ATTORNEY FOR DEFENDANT IN
CROSS—CLAIM, WILLIE DANOS
TELEPHONE: (504) 657-7668

APPENDIX D

MINUTE ENTRY
LIVAUDAIS, M.
APRIL 7, 1978

FILED APR. 10, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DORIS JEAN FISHER — CIVIL ACTION

VERSUS — NUMBER 75-3447

WILLIE DANOS, ET AL. — SECTION "E"

A preliminary conference was held on April 7, 1978.

PRESENT: NO APPEARANCE FOR PLAINTIFF
DARRYL W. BUBRIG, SR.,
ATTORNEY FOR WILLIE DANOS
CHARLES HANEMANN,
ATTORNEY FOR GULF OIL AND
TRAVELERS INS.

Pleadings have been completed.

Jurisdiction is established.

Motions will be filed so as to be noticed for a motion day not less than thirty days prior to the date fixed for

trial.

Discovery will be completed not later than 21 days prior to the date fixed for pre-trial conference.

Settlement possibilities were discussed.

This case does not involve extensive documentary evidence.

A final pre-trial conference will be held before the District Judge on October 10, 1978 at 9:45 A.M. Counsel will be prepared in accordance with the final pre-trial notice attached.

Trial will commence on October 23, 1978 at 10:00 A.M. before the District Judge with a jury. It is expected to last 2 days.

CLERK TO NOTIFY COUNSEL

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DORIS JEAN FISHER — NO. 75-3447

Versus — CIVIL ACTION

WILLIE DANOS,
GULF OIL CORPORATION, AND
THE TRAVELERS INSURANCE CO. — SECTION "E"

JUDGMENT

Considering the answers of the jury to interrogatories prepounded to it by the Court at the trial of this matter on April 9, 1980, and

Considering the direction of the Court as to entry of judgment upon said answers;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Gulf Oil Corporation, and The Travelers Insurance Co., and against plaintiff, Doris Jean Fisher, dismissing said plaintiff's suit with costs.

IT IS ACCORDINGLY, ORDERED that the cross-claim of Gulf Oil Corporation, and The Travelers Insurance

Co., against Willie Danos, is hereby DISMISSED.

New Orleans, Louisiana, this 10th day of April, 1980.

/S/FRED J. CASSIBRY

UNITED STATES DISTRICT JUDGE

APPENDIX F

Doris Jean FISHER, Plaintiff-Appellant
Cross-Appellee,

v.

Willie DANOS, Defendant-Appellee,

v.

GULF OIL CORPORATION and Travelers Insurance Company, Defendants-Appellees Cross Appellants.

No. 80-3510

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 31, 1982.

Action was brought against oil company and its insurer to recover for injuries sustained when a skiff on which plaintiff was a passenger struck an unlit jetty built by oil company in the Mississippi River. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., rendered judgment for defendants on jury verdict, and appeal and cross appeal were taken. The Court

of Appeals, Brown, Circuit Judge, held that: (1) suit was within the admiralty jurisdiction; (2) plaintiff was entitled to revoke her election of jury trial, and since defendants were not prejudiced by election of nonjury trial the case should have been tried nonjury; and (3) that, on remand, district court made its decision solely on basis of records and testimony as submitted to the jury.

Reversed and remanded.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal arises from Doris Jean Fisher's lawsuit against Gulf Oil Company and The Travelers Insurance Company for injuries sustained when a skiff on which Fisher was passenger struck an unlit jetty built by Gulf. The owner of the skiff, Willie Danos, was released by compromise before this suit was filed. At trial, the jury found on special interrogatories that Gulf was not negligent, that the negligence of Mr. Danos was 70 percent, and that Doris Fisher was 30 per cent contributorily negligent. Judgment was entered on the verdict, and following denial of motion

for j.n.o.v. or for new trial or both, the present appeal was brought. Gulf and Travelers have filed a cross-appeal, claiming that the compromise executed by Fisher released Gulf and Travelers as well as Danos. On the basis of Fisher's right to a non-jury trial, we reverse and remand to the District Court for reconsideration by the Judge on the basis of the present record uninfluenced by the jury verdict.

Non-Jury Trial Election[1]

Fisher contends that she was entitled to a non-jury trial because of the maritime nature of her claim. *See* F.R.Civ.P. 9(h); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252 (5th Cir. 1975) (general rule that admiralty claims are to be tried without a jury). After Danos was released, complete diversity of citizenship existed, and Gulf amended its answer to plead diversity and pray for trial by jury. In January, 1978, a pre-trial order designated the case as one to be tried by a jury. Fisher contends that

---

[1] The Court requested that the parties in this dispute submit supplementary briefs addressing this complex issue as follows:

(1) In an admiralty action pursuant to Rule 9(h), does the plaintiff have an absolute right to a non-jury trial, and does acquiescence in a pre-trial order, which designates the case as one to be tried by a jury, constitute an "election" by the plaintiff to proceed to trial with a jury? *See Johnson v. Penrod*, 469 F.2d 897 at 903.

(2) When a cause of action begins and remains an admiralty suit pursuant to Rule 9(h), what effect does the complete diversity of parties under federal rules of jurisdiction have upon (a) the plaintiff's right to demand a non-jury trial and (b) the defendants' right to a jury trial? *See Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063 at 1066.

she repeatedly sought to amend this order to obtain a non-jury trial, and that her signature on the first pre-trial order did not constitute a final election. Even if that order is seen as an election, it is argued that it is not irrevocable. Because seventeen months elapsed between notice to Gulf of Fisher's desire to proceed without a jury and the commencement of trial, and because Gulf understood that this action was capable of being brought within admiralty jurisdiction, she urges that no prejudice may be claimed by Gulf.

Both sides of the present dispute agree that a Rule 9(h) election, whether to proceed in admiralty without a jury or at law with a jury, is not irrevocable. *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 339 (5th Cir. 1972). Gulf perceives that although Fisher elected in her complaint to proceed without a jury under Rule 9(h), she later impliedly revoked that election, with the consent of the court and the defendants, and chose to proceed with a jury.

(Footnote 1 continued)

(3) Does a defendant in a 9(h) case have a legal *right* to a jury trial (a) in the absence of any opposition from the 9(h) plaintiff? (b) when opposed by the 9(h) plaintiff?

(4) Were the defendants entitled to a trial by jury on the issue of whether or not Fisher released her claims against Gulf and Travelers?

(5) If this Court finds that the plaintiff was entitled to a non-jury trial, can the District Court make its decision solely on the basis of the records submitted to the jury, or will a new trial be required?

From Gulf and Travelers, we received a detailed brief outlining several aspects of the right to a jury trial in admiralty cases. Counsel for Fisher, in response, merely filed a singularly unhelpful letter that failed to address any one of the Court's specific questions regarding the issue of non-jury trial election.

Gulf bases its perception upon her attorney's signature on the pre-trial order of January, 1978. Moreover, Gulf contends that Fisher acquiesced in the District Court's April, 1978, setting of the case for trial by jury. However, on October 10, 1978, at a second pre-trial conference, Fisher challenged Gulf's right to trial by jury. Because trial was scheduled for October 23, 1978, Gulf quickly moved for recognition of its right to a trial by jury on the issue of whether the compromise agreement with Danos also released Gulf and Travelers. Fisher then filed a memorandum alleging that her right to a non-jury trial, or, in the alternative, the right to revoke her choice of trial by jury, was never waived and surely persisted as a greater right than Gulf's right to a jury on the incidental demand against Danos. Gulf's motion for a jury was granted, but the October 23, 1978, trial setting was continued. Fisher filed an interlocutory appeal to this Court on the jury issue, and we disallowed the appeal as not ripe for judicial review.

[1] The issue is further complicated by Gulf's position that it is entitled to a trial by jury because complete diversity of citizenship exists between Fisher and the defendants Gulf and Travelers. Indeed, Gulf even argues that diversity is the only basis for federal jurisdiction in this case, thus creating its absolute right to trial by jury. However, given the facts that the vessel involved in this accident was not primarily a pleasure boat, that the accident occurred on a navigable channel of the Mississippi River, and that the alleged cause of the collision was an unlit jetty obstructing the channel, we find that the case is

properly characterized as one in admiralty.[3] *See Kelly v. Smith*, 485 F.2d 520, 523-526 (5th Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974). In the alternative, Gulf argues that even if it did not have a right to a trial by jury, the trial judge may properly have the case tried to an advisory jury, F.R.Civ.P. 39(c); thus if any error exists as to Fisher's right to a non-jury trial, the error is harmless. This matter deserves more attention, particularly with regard to the District Court's admiralty jurisdiction.

[2] In *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972), this Court faced the situation where Rule 9(h) plaintiffs attempted to withdraw their earlier demand for trial by jury without the consent of the defendants and without a finding by the District Court that a right to trial by jury did not exist. 469 F.2d at 901-03. We held that the defendant was entitled to trial by jury because the plaintiffs did not comply with F.R.Civ.P. 39(a). Likewise, in *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975), a plaintiff was forced to a non-jury trial because of his failure to amend and withdraw his admiralty claim under Rule 9(h). 515 F.2d at 1253. The present case, however, is somewhat more confusing. Fisher did attempt

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[3] Fisher, in her original complaint, properly identified her claim as one falling under the admiralty and maritime jurisdiction within the meaning of Rule 9(h). Although Gulf properly points out that Rule 9(h) is especially designed for cases which are subject to admiralty and also some other ground of federal jurisdiction, we find that when the defendant Dancs was released, and diversity jurisdiction arose, Fisher's claim was adequately identified, in her original pleading, as an admiralty claim under Rule 9(h). *See Moore's Federal Practice Rules Pamphlet*, F.R.Civ.P. 9 at 9.2[6], Comment on 9(h) (1981).

to oppose Gulf's insistence on a jury trial and, given our construction that the claim was adequately identified as one under admiralty, her right to a non-jury trial remained an option even if she had earlier consented to a trial by jury.

In *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 986 (5th Cir. 1978), we held that "by electing to proceed under 9(h) rather than by invoking diversity jurisdiction, the plaintiff may preclude the defendant from invoking the right to trial by jury which may otherwise exist." 577 F.2d at 986, *citing Romero, supra.* Rule 9(h) is a "device by which the pleader may claim the special benefits of admiralty procedures...including a non-jury trial." *Romero*, 515 F.2d at 1252. There can be no doubt that this case was within the Court's admiralty jurisdiction. The substance of the injuries took place on navigable waters in connection with the navigation of a vessel. *See Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), *cited in Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1009 (5th Cir. 1980); *Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319, 320-22 (5th Cir. 1980); *Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980). In light of Fisher's right to a non-jury trial, we must remand this case to the District Court.[3] However, a new trial is not technically re-

[3] Although Fisher's election of a non-jury trial was made just 13 days before the initial trial setting, an action that might have severely prejudiced Gulf and Travelers, the actual trial did not take place for another 17 months. Thus it could not be said that, in actuality, Gulf and Travelers relied on the plaintiff's first election for a jury trial.

quired in the present action, because the district Court shall make its decision solely on the basis of the records and testimony as submitted to the jury.

Extent of the Release

Before concluding, it is necessary to address Gulf's cross-appeal. Gulf urges that even if this Court finds errors in the trial proceedings such errors are harmless because the trial court should have dismissed Fisher's claims on the grounds of the release executed February 28, 1975. Gulf relies on the language in the compromise agreement stating that Fisher releases "Willie Danos and all other persons." At trial, Fisher by her testimony claimed to have not understood all of the terms of the agreement that she signed. The District Court granted a directed verdict against Gulf and Travelers, recognizing Fisher's intent to reserve all of her rights against Gulf and Travelers. The issue was argued by counsel for both sides at a hearing on May 3, 1978, and Gulf's motion for summary judgment on the basis of release was denied.

Gulf claims that factual issues existed that should have been decided by the jury, namely whether Fisher did intend to release her claims against Gulf and Travelers, notwithstanding her testimonial, self-serving denial of such intent at trial. Fisher argues, and the District Court apparently agreed, that it is unthinkable that she would release her claims against Gulf and Travelers in light of the serious injuries that she sistained. This Court, in *Boeing*

Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969), set forth the standard to be applied on motions for directed verdicts:

> [The] Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the [motion] should be denied, and the case submitted to the jury.

A careful reading of the document entitled "Release and Agreement", executed on February 28, 1975, reveals that Willie Danos is the central figure in the compromise agreement. It states that Fisher and Danos agree to compromise any claims against Danos in exchange for payment of medical expenses and reasonable living expenses including the purchase of a mobile home. The controversial clause follows, that Fisher expressly releases and forever

discharges "Willie Dance and all other persons, from any and all claims for damages arising out of or in any way connected with the boating incident..." Also included is a declaration that Fisher fully understands the compromise settlement.

Under the peculiar circumstances of this case, we need not determine whether the directed verdict was correct, since the Judge as trier of fact can now determine the issue both as a matter of fact and, on such finding, as a matter of law.

Conclusion

Because of our remand for a trial by the trial judge on the basis of the record made before the jury, it is unnecessary for us to reach the issues of (i) whether the jury instructions were proper, and (ii) whether the jury's finding of contributory negligence was supported by the record.

REVERSED AND REMANDED.